

**A Bumiputra Commerce Bank Berhad v Mahkamah
Perusahan Malaysia & Anor**

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-
13 OF 2000

RAUS SHARIF J

B 22 MARCH 2004

Administrative Law — Remedies — Certiorari — Domestic inquiry conducted prior to dismissal — Whether Industrial Court had jurisdiction to hear matter de novo — Whether Industrial Court committed error of law in deciding matter without regard to notes of domestic inquiry

C *Labour Law — Industrial Court — Award — Application to quash — Industrial Court made finding that charges preferred against second respondent were not proven despite employee's admission in domestic inquiry — Whether Industrial Court misconstrued and misapplied principles of law pertaining to domestic inquiry — Whether Industrial Court committed error of law*

D *Labour Law — Industrial Court — Jurisdiction — Domestic inquiry conducted prior to dismissal — Whether Industrial Court had jurisdiction to hear matter de novo — Whether Industrial Court committed error of law in deciding matter without regard to notes of domestic inquiry*

E The second respondent was dismissed by the applicant after a domestic inquiry found him guilty of the following charges: (a) that the second respondent had abused his position as an officer of the applicant when he deliberately arranged for the granting of overdraft facilities to certain customers and after approval thereof, utilised the said facilities either by operating and/or exercising control over the operation of the accounts; (b) that by utilising the facilities, the second respondent had directly or indirectly received the facilities for his personal pecuniary benefit; and (c) that with intent to deceive, the second respondent added another signature on the specimen card of the said customers and caused a false entry to be made in the applicant's documents. At the domestic inquiry, the second respondent admitted that he had kept the cheque book of the said customers and that he had added the third signature to the specimen card.

G The second respondent filed a representation under s 20(1) of the Industrial Relations Act 1967 ('the Act'). Pursuant to s 20(3) of the Act, the Minister of Human Resources referred the matter to the Industrial Court. The Industrial Court made a finding that all the charges preferred against the second respondent were not proven and accordingly decided in favour of the second respondent.

H This was the applicant's application for an order of certiorari to quash the award of the Industrial Court. The applicant's main complaint was that the Industrial Court was wrong to hear the matter de novo.

Held, allowing the application:

I (1) When a domestic inquiry was conducted by an employer prior to a dismissal, the Industrial Court was under a duty to first consider and determine whether the inquiry was proper. Upon such consideration and if the Industrial Court arrived at a finding that due inquiry had been

- carried out, the Industrial Court should not proceed to hear the matter de novo but, instead, consider whether a prima facie case had been made out against the employee. Thus, where due inquiry had been held, the Industrial Court's jurisdiction was limited to considering whether there was a prima facie case against the employee (see paras 9 and 18).
- (2) In the instant case, the Industrial Court did not address the issue of whether a proper domestic inquiry had been held and whether the conclusion reached by the inquiry panel was perverse. In cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes were accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and in fact, contrary to evidence (see paras 21 and 22); *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another Appeal* [1995] 2 MLJ 753 and *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 distinguished.
- (3) The Industrial Court's conclusion, that all charges preferred against the second respondent were not proven, was contrary to clear evidence. It was apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry. Therefore, the applicant had demonstrated ample proof of errors of law and as such, this court was compelled to exercise its judicial review powers to issue an order of certiorari to quash the award (see paras 28 and 29).

[Bahasa Malaysia summary]

Responden kedua telah dibuang kerja oleh pemohon selepas siasatan domestik mendapati responden kedua bersalah atas tuduhan-tuduhan berikut: (a) responden kedua telah menyalahgunakan kuasanya sebagai seorang pegawai di syarikat pemohon apabila responden kedua telah dengan sengaja membuat persediaan untuk memberikan perkhidmatan overdraf kepada pelanggan-pelanggan tertentu dan selepas mendapatkan kelulusan, telah menggunakan kemudahan tersebut sama ada melalui pengendalian atau melaksanakan kuasa ke atas pengendalian akaun-akaun berkenaan; mengaturkan perkhidmatan apabila beliau menguruskan perkhidmatan overdraf untuk beberapa pelanggan tanpa kelulusan pihak bank, beliau juga telah menggunakan kuasa yang melebihi bidangnya; (b) responden kedua telah menggunakan kemudahan-kemudahan yang disediakan oleh bank secara langsung atau tidak langsung untuk kepentingan dirinya; dan (c) responden kedua mempunyai niat untuk memperdaya apabila beliau telah menambahkan satu lagi ruang tandatangan dalam kad spesimen bagi pelanggan tertentu dan menyebabkan kenyataan palsu dibuat dalam dokumen pemohon. Ketika siasatan domestik dilakukan, responden kedua mengakui bahawa beliau menyimpan buku cek bagi pelanggan-pelanggan tersebut dan telah menambahkan tandatangan ketiga di kad-kad spesimen.

- A** Responden kedua telah memfailkan representasi di bawah s 20(1) Akta Perhubungan Perusahaan 1967 (Akta tersebut). Mengikut s 20(3) Akta tersebut, Menteri Sumber Manusia telah merujuk perkara ini kepada Mahkamah Perusahaan. Mahkamah Perusahaan berpendapat bahawa kesemua tuduhan yang dibuat ke atas responden kedua tidak dapat dibuktikan dan telah membuat keputusan yang menyebelahi responden kedua.
- B**

Ini merupakan permohonan perayu untuk memperoleh perintah certiorari untuk membatalkan award yang telah diberi oleh Mahkamah Perusahaan. Aduan utama perayu adalah bahawa Mahkamah Perusahaan tidak mempunyai bidang kuasa untuk mendengar hujahan secara de novo.

- C**
- Diputuskan,** membenarkan rayuan tersebut:

- (1) Apabila majikan menggunakan penyiasatan domestik sebagai asas untuk memecat pekerjaanya, Mahkamah Perusahaan mestilah mempertimbangkan sama ada siasatan yang dibuat adalah betul.
- D** Selepas mempertimbangkan semua aspek dan setelah mendapati bahawa siasatan domestik telah berjalan dengan lancar, Mahkamah Perusahaan tidak perlu meneruskan pendengaran de novo tetapi mempertimbangkan sama ada kes prima facie dapat diwujudkan menentang pekerja tersebut. Bidang kuasa Mahkamah Industri adalah dalam kes siasatan domestik cuma terhad kepada memastikan sama ada kes prima facie menentang pekerja (lihat perenggan 9 dan 18).
- E**
- (2) Di dalam kes ini, Mahkamah Industri tidak mempertimbangkan isu sama ada siasatan domestik yang telah dilakukan dengan betul, dan jika kesimpulan yang telah diperolehi oleh panel siasatan domestik itu boleh dibantah. Mahkamah Perusahaan mesti mengambil kira sama ada siasatan domestik itu sah dan jika prosiding siasatan itu betul. Dalam ketiadaan pertimbangan dan sokongan sedemikian mengenai kesahan siasatan domestik dan ketepatan nota siasatan, tindakan Mahkamah Perusahaan untuk terus memutuskan isu tersebut tanpa mengambil kira nota siasatan pada keseluruhannya tidak boleh disifatkan sebagai lebih dari suatu kekhilafan di sisi undang-undang. Maka dengan itu, keputusan Mahkamah Perusahaan bahawa kesemua tuduhan menentang responden kedua tidak boleh dibuktikan dan tidak mengikut bukti yang dikemukakan (lihat perenggan 21 dan 22), *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another Appeal* [1995] 2 MLJ 753 and *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 dibeza.
- F**
- G**
- H** (3) Kesimpulan Mahkamah Perusahaan, bahawa kesemua tuduhan yang dikemukakan terhadap responden kedua tidak boleh dibuktikan, bertentangan dengan bukti yang nyata. Jelas di sini bahawa Mahkamah Perusahaan telah salah tafsir prinsip undang-undang mengenai prosedur siasatan domestik. Perayu telah mengemukakan bukti bahawa terdapat kesilapan fakta undang-undang dan mahkamah berhak menggunakan kuasanya untuk memerintahkan satu perintah certiorari untuk membatalkan award tersebut (lihat perenggan 28 dan 29).]
- I**

Notes

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 394-417.

For cases on Industrial Court's awards, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241-1288.

For cases on jurisdiction of Industrial Court, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1323-1375.

Cases referred to

Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor [1998] 1 MLJ 111 (refd)

Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd [1998] 1 CLJ 637 (refd)

Metroplex Administration Sdn Bhd v Mohamed Elias [1998] 5 CLJ 467 (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537 FC (distrd)

Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Renganathan v Malayan Breweries (Malaya) Sdn Bhd [1997] 1 MLJ 352 (refd)

UMW Toyota (M) Sdn Bhd v Chow Weng Thiem [1996] 5 MLJ 678 (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another Appeal [1995] 2 MLJ 753 FC (distrd)

Workmen of the Motipur Sugar Factory Private Limited v The Motipur Sugar Factory Private Limited AIR 1965 SC 1803 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 14(1), 20(1), 20(3)

A Selvamalar (Skrine) for the applicant

P Vickneswaren (Kavin Lim with him) (Murugavell Arumugam & Co) for the second respondent

Raus Sharif J:

[1] This is an application by Bumiputra-Commerce Bank Berhad ('the applicant') for an order of certiorari to quash the Industrial Court Award No 690 dated 20 December 1999. In the said Award, the Industrial Court found that the second respondent had been dismissed without just cause or excuse. Consequently, the Industrial Court ordered back wages and compensation in lieu of reinstatement as follows:

- (i) the second respondent to be paid back wages from the date of dismissal (27 December 1995) to the final date of hearing (10 June 1999) subject to the maximum of 24 months, that is, RM2,600 x 24 = RM62,400;
- (ii) the second respondent shall be paid in lieu of reinstatement one month's salary for every year of completed service from the date of joining (1 June 1989) to the final date of hearing (10 June 1999), that is, RM2,600 x 18 = RM46,800.

[2] Briefly, the factual background that led to this application by the applicant is as follows.

[3] The second respondent joined the services of the applicant's bank on 1 June 1981 beginning as a clerk. He was then promoted to the position of officer in Grade II effective as at 1 June 1990. On 3 June 1993 he was then

A again promoted to the position of Assistant Manager of Credit. On 7 March 1994, he was subsequently promoted to the level of Grade 10 effective from 1 July 1993. His last basic salary was RM2,600.00 per month.

[4] By a letter dated 14 April 1995, the applicant levelled three charges against the second respondent. The charges read as follows:

B 1. That you had abused your position as an officer of the Bank and brought your private interest into conflict with your duties as such, when you deliberately arranged for the granting of overdraft facilities to the below mentioned customers and after approval thereof utilized the said facilities, either by operating and/or exercising control over the operation for the relevant correct accounts and your personal benefits.

C

Name of Customer	Account No.	A/A No.	Date of Approval	Amount
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D

1. Mohd. Lofti Hussin and Zainatul Husniah Bt. Hussin	4421-03	OD/S/92018	29.01.1992	50,000.00
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2. Azizah Abas & Noraini Abas	4496-55	OD/MC/92046	27.02.1992	50,000.00
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You had, therefore contravened the Treasury and Investment banking Circular No. 88/47 P.U. No 381: Code of Ethics dated 12 December, 1998.

F 2. In furtherance to Charge No 1 above, you had, by utilizing the said overdraft facilities, thereby directly or indirectly received or agreed to receive a facility for your personal pecuniary benefit or advantage.

You had therefore, contravened Section 115(1) of the Banking And Financial Institution Act 1989.

G 3. That you had, with intent to deceive, added another signature on the specimen signature cards pertaining to the current account of customers as mentioned in charge No 1 above, and thereby you made or caused to be made false entry in the Bank's document.

You had therefore, contravened Section 105 of the Banking And Financial Institution Act 1989.

H **[5]** A domestic inquiry was held against the second respondent on 8 November 1995. Resulting from the domestic inquiry, the second respondent was dismissed on 27 December 1995.

I **[6]** The second respondent filed a representation under s 20(1) of the Industrial Act 1967 ('the Act') as he considers his dismissal was without just cause or excuse. Pursuant to s 20(3) of the Act, the Honourable Minister of Human Resource referred the matter to the Industrial Court. The Industrial Court decided in favour of the second respondent. Hence, the applicant is now challenging the Award.

[7] The applicant, in support of this application, advanced a number of grounds. Basically, the main complaint of the applicant is that the Industrial Court was wrong to hear the matter de novo. In hearing the matter de novo, it is submitted by the applicant that the Industrial Court failed to consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. Thus, according to the applicant, the Industrial Court in coming to the conclusion that all charges preferred against the second respondent were not proven, had failed to take into account certain relevant factors but took into account certain irrelevant factors in making its decision.

[8] The Industrial Court in deciding to hear the matter de novo relied on the decisions of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 and *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 to support its decision. The learned Chairman said as follows:

Bearing in mind the decisions of *Wong Yuen Hock* and *Milan Auto Sdn Bhd* cases (supra) the Court is of the view that this matter should be considered de novo in the hearing before this Court and that it is incumbent upon the Court to consider whether each of the charge has been properly proceeded by the Bank.

[9] It is the submission of learned counsel for the applicant that the Industrial Court has misinterpreted the principle established in the two cases. According to her, when a domestic inquiry is conducted by an employer prior to a dismissal, the Industrial Court is under a duty to first consider and determine whether the inquiry was proper. Upon such consideration, if the court arrives at a finding in which the due inquiry had been carried out, the Industrial Court should not proceed to hear the matter de novo but to consider whether a prima facie case has been made out against the employee.

[10] Learned counsel for the second respondent, on the other hand, contended otherwise. He submitted that following the decisions of *Wong Yuen Hock* and *Milan Auto*, the duty of the Industrial Court to consider a reference under s 20 of the Act is:

- (a) whether the misconduct or irregularities complained of were in fact committed by the workman; and
- (b) if the workman did commit the misconduct or irregularities, did that constitute just cause or excuse to dismiss the workman or, in other words, whether the punishment of dismissal is justified based on the proven facts of the case.

[11] Thus, according to him, there is no requirement for the Industrial Court to firstly determine the validity of the domestic inquiry which was conducted by the applicant. Instead, it is incumbent on the Industrial Court to determine the second respondent's case de novo on the merits of the case.

[12] In order to properly appreciate this important principle of law pertaining to the effect that a domestic inquiry has on the Industrial Court proceeding, it is necessary to look at its development.

- A** [13] Prior to the Supreme Court's decision of *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1998] 1 MLJ 111, the position in Malaysia was that failure by an employer to conduct a domestic inquiry prior to dismissal for misconduct, automatically resulted in a finding of unjust dismissal by the Industrial Court. In the *Dreamland* case, the Supreme Court referred to the Indian Case of *Workmen of the Motipur Sugar Factory Private Limited v The Motipur Sugar Factory Private Limited* AIR 1965 SC 1803 where it was held by the Indian Supreme Court that, 'Where an employer has failed to make an inquiry before dismissing or discharging a workman it is open to him to justify his action before the Tribunal by leading all relevant evidence before it. The entire matter would be open before the Tribunal ...'. The Malaysian Supreme Court succinctly stated that having considered the aforesaid Indian case, they 'propose to say nothing more beyond saying that it is in accord with our view of the law in the instant appeal'.
- B**
- C**
- D** [14] Thus, the position had effectively changed so that failure on the part of an employer to hold an inquiry was no longer considered fatal. Nevertheless, there were attempts by our courts to distinguish this principle in cases where the contractual position as between the employer and employee provided for an inquiry to be held and also in instances where the employee came within the purview of the Employment Act 1955, since the Act, in s 14(1), expressly requires an inquiry to be held before dismissal. This distinction was done away with by the *Wong Yuen Hock* and *Milan Auto* cases.
- E**
- F** [15] However, the Supreme Court in *Said Dharmalingam bin Abdullah (formerly known as Dharmalingam all Renganathan) v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352, revived the distinction as far as employees under the Employment Act 1955 are concerned. The Supreme Court distinguished *Dreamland* and *Wong Yuen Hock* and held that where an employee is an 'employee' within the meaning of the Employment Act 1955, he has by s 14(1) thereof a statutory right to 'due inquiry'.
- G** [16] Abdul Kadir Sulaiman J in *Ganesan G Suppiah v Mount Pleasure Corp Sdn Bhd* [1998] 1 CLJ 637, declined to follow *Said Dharmalingam* and instead followed the earlier cases of *Dreamland* and *Wong Yuen Hock*.
- H** [17] In none of these cases, however, was it laid down that the Industrial Court is duty bound to conduct a de novo hearing even where a due inquiry has been conducted by the employer. The Federal Court cases of *Wong Yuen Hock* and *Milan Auto* are cases where domestic inquiries were not held.
- I** [18] Thus, I am of the view that the principle laid down in both cases cannot be said to extend to instances where a domestic inquiry has been held. As such, I am in agreement with the submission of learned counsel for the applicant that, where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a prima facie case against the employee. This proposition is not without support. In *Dreamland* itself, the Supreme Court, after referring to the Indian case of *Motipur Sugar Factory*, held that, 'In India, it seems the failure is not fatal to the employer and he would be entitled to justify it before the Industrial

Tribunal. If he had held the inquiry, he should have been told that they would not interfere unless they want the inquiry to be fair.' The Supreme Court enunciated this before going on to say that the passage referred to in *Motipur's* case is in accordance with their view of the law.

[19] In *UMW Toyota (M) Sdn. Bhd. v. Chow Weng Thiem* [1996] 5 MLJ 678, Abdul Malik Ishak J held that in light of the employee's admission at the domestic inquiry, the court was under no further obligation to make any further inquiry and a decision or an order could be made based on the admission. Although this was an appeal from a civil claim brought by the dismissed employee, I am of the view that the principle remains the same.

[20] In *Metroplex Administration Sdn Bhd v Mohamed Elias* [1998] 5 CLJ 467, Low Hop Bing J, in considering a certiorari application to quash an Industrial Court award, held as follows:

Where a domestic inquiry is held and the rules of natural justice have been applied, the Industrial Court should first consider the adequacy or otherwise of the procedure adopted in the proceedings for the domestic inquiry in order to determine whether the domestic inquiry has applied the correct procedure and reached the correct conclusion having regard to all the evidence, documentary and oral, adduced at the domestic inquiry. If at the domestic inquiry, the rules of natural justice were properly applied, the employee being given the opportunity to be heard and to present his case, and should a finding be made against the employee based on the evidence which was presented to the domestic inquiry, the Industrial Court ought to consider the finding of the domestic inquiry in order to conclude whether the employee has been dismissed without just cause or excuse. The rule that a domestic inquiry should be held is after all a rule of the court's own devising.

[21] In the instant case, the Industrial Court did not address the issue whether a proper domestic inquiry had been held and whether the conclusion reached by the inquiry panel was perverse. Thus, clearly the Industrial Court has misinterpreted the decision in *Wong Yuen Hock* and *Milan Auto* and erroneously decided that the matter should be considered de novo. To me, the two cases are cases where a domestic inquiry was not held, therefore, are distinguishable. Furthermore, neither of the said cases has the proposition laid down that it would be inevitable for the Industrial Court to ignore the fact that a valid inquiry had been carried out, and thus simply proceed to hear the matter de novo.

[22] Thus, I am of the view that in cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and are in fact contrary to evidence.

- A** [23] The charges against the second respondent involved conflict of interest between the second respondent's private interest and that of the applicant whereby the second respondent had either directly or indirectly derived benefits or advantages and the allegation is that he had added another specimen signature to the records of the applicant's customers. The Industrial Court in its findings stated that the second respondent was not proven to have made, used or exercised control over the accounts stated, for there was no evidence that the claimant made, used or tried to use the said accounts or exercised control of the accounts for his benefit.
- B**
- C** [24] I am of the view in coming to the said conclusion, the Industrial Court had failed to take into consideration the evidence of the second respondent himself at the domestic inquiry, bearing in mind the notes of inquiry had been accepted by the court as an exhibit. The second respondent confirmed that he kept the cheque book of the customer. Again there was evidence given by COW3 during the Industrial Court's hearing that the second respondent had told him during the investigation that he kept the cheque book and also that he signed the cheques.
- D**
- E** [25] The Industrial Court had also failed to take into consideration the fact that the facility in question was for the purpose of investment, namely, purchase of shares which had been utilised to settle a loan due to the second respondent. Although the Industrial Court had made reference to the purpose of the loan, it failed to consider that the second respondent had allowed or accommodated the customer to use it for a different purpose, as such the loan was granted for the purpose of refunding a loan due to him. Thus, the Industrial Court, failed to consider this aspect of the conflict of interest.
- F**
- G** [26] In considering the second charge, that is, the second respondent in utilising the facilities had directly or indirectly received or agreed to receive pecuniary benefit or advantage and thereby had contravened s 115 of the Banking and Financial Institution Act 1989, the Industrial Court made a finding that there was no convincing evidence that the second respondent benefited or made gains from the transaction. I am of the view that the Industrial Court had failed to consider that repayment of a loan due to the second respondent has benefited or given an advantage to the second respondent as he is receiving monies due to him.
- H** [27] With regard to the third charge, that is, the second respondent added a signature to the specimen card of customers, the Industrial Court made a finding that the second respondent was not involved, based on the testimonies of CCW2, CCW3 and CCW4 and the 'unrebutted' evidence of the second respondent. I am of the view, in making this finding, the Industrial Court had again failed to consider the notes of inquiry which clearly showed that the second respondent had confirmed and admitted that he added the third signature to the specimen card. COW4 also testified in the Industrial Court that the second respondent had admitted to adding the signature.
- I**

[28] To me, the Industrial Court's conclusion that all charges preferred against the second respondent were not proven is contrary to clear evidence. It is apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry.

[29] In conclusion, I am of the view that the applicant has demonstrated ample proof of errors of law thereby compelling this court to exercise its judicial review powers to issue an order of certiorari to quash the Award. Accordingly, the applicant's application is allowed with costs.

Applicant's application allowed with costs.

Reported by Lim Lee Na

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